

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION**

**FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
AMERIBANK, INC.**

Plaintiff,

v.

**JACK A. BALDINI; DAVID G.
COGSWELL; LOUIS J. DUNHAM;
MICHAEL O'BRIEN; and
JAMES SUTTON,**

Defendants.

Civil Action No. 1:12-7050

Judge David A. Faber

MOTION TO DISMISS OF DEFENDANT JAMES M. SUTTON

Defendant James M. Sutton ("Sutton"), by and through his attorneys, moves to dismiss the Complaint of the Federal Deposit Insurance Corporation, as receiver for Ameribank, Inc. (the "FDIC"), pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Sutton also adopts and incorporates by reference herein the following discussions in the Memorandum of Law in Support of Defendant Jack A. Baldini's Rule 12(b)(6) Motion to Dismiss (the "Baldini Motion"): Statement of Material Allegations; Legal Standard; and Argument Sections I.A., I.B., and II.B. Those discussions in the Baldini Motion are equally applicable to Sutton.

Sutton's Motion to Dismiss should be granted for at least three reasons:

(1) The Complaint's negligence and breach of fiduciary duty claims are not viable as a matter of law because, under the business judgment rule, directors and officers cannot be liable for ordinary negligence;

(2) The Complaint does not plead a plausible theory of gross negligence and, in fact, the documents relied upon by the FDIC reveal a far more plausible account of non-negligence;

and

(3) Insofar as (a) the FDIC complains only of officer conduct, (b) Sutton was only an officer for 29 days during the relevant period, and (c) only 2 of the allegedly “deficient” 32 loans identified by the FDIC were funded in that 29-day period, Sutton cannot be liable for the other 30 loans.

Based on this Motion, the accompanying Memorandum of Law in Support of the Motion, the Exhibit to this Motion (to be filed separately under seal at the request of the FDIC), and the arguments in the Baldini Motion that are adopted and incorporated in this Motion, Sutton respectfully asks the Court to dismiss the Complaint.

Dated: January 14, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify "Motion To Dismiss of Defendant James M. Sutton", was served upon the following counsel of record via the court's ECF filing system on 14th day of January, 2013.

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/s/ Michael W. Carey
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